REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI COMMERCIAL & ADMIRALITY DIVISON)

CIVIL CASE NO. 219 OF 2004

ZAKAYO NDUNGU NGUGI.……...…….……....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED…….....…….1ST DEFENDANT

WAINAINA KAMAU.....2ND DEFENDANT

JUDGEMENT

This suit was commenced by way of a plaint dated 8th March, 2004, and filed in this Court on 15th March 2004, and which was amended on 19th February, 2010. In the amended plaint the plaintiff seeks judgement against the defendants jointly and severally for:

a) A declaration that the Auction sale of LR No. Nyandarua/Ndemi/1474 is illegal, null and void.

b) An order compelling the Land Registrar (Nyandarua) to rectify the record reversing ownership of LR No. Nyandarua/ndemi/1474 to the Plaintiff Zakayo Ndung'u Ngugi.

c) An order restraining the second defendant from transferring LR Nyandarua/Ndemi/1474 to the 2nd defendant or to any other person.

d) Costs of this suit

e) Any other or further relief or reliefs as this Honourable Court may deem fit to grant.

It is the plaintiff's case that the plaintiff's suit parcel of land being Nyandarua/Ndemi/1474 was illegally and fraudulently transferred to the 2nd defendant by the 1st defendant. In his amended plaint, while admitting the existence of Nairobi HCCC No. 2004 of 2000 contends that the same was seeking to stop the sale which had already taken place.

The defendants filed separate defences, although their contents are similar on 28th April 2004 and 24th May 2004 respectively. In the said defences they denied the plaintiff's claim contending that the sale of the suit property was lawfully carried out pursuant to the relevant provisions of the law. While admitting the jurisdiction of the Court, the defendants pleaded that this case is *res judicata* on the ground that HCCC No. 2004 of 2000 was dismissed with costs by this court on 3rd June 2003 and hence the plaintiff is guilty of deliberately concealing such material facts.

In support of his case, the plaintiff herein, **Zakayo Ndungu Ngugi** testified on 24th January 2012 that he was the registered proprietor of land parcel no. Nyandarua/Ndemi/1474 where he is residing since the time he purchased the same and in support of his case he produced a copy of the tile deed as exhibit 1. In the February 1994 he offered his said parcel of land to secure loan of Kshs. 200,000/- from National Bank of Kenya Limited to one **Gideon Karia** trading as G K Associates. A letter of offer was accordingly executed and the charge prepared and duly registered. He produced copies of the letter of offer, consent and charge documents as exhibits.

According to him, the principal borrower informed him that the loan was being repaid until sometime in the year 2001 when he realised that payment was not regular. Accordingly by his letter dated 21st November 2001 he wrote a letter to the defendant Bank seeking information of the status of the principal debtor's indebtedness. In the said letter a copy of which was also produced as exhibit he requested the Bank to consider waiving the interests and charges on payment of the principal sum of the said Kshs. 200,000/-. The Bank did accept his request vide its letter dated 13th March 2002 also produced as exhibit on condition that the principal debtor provides a security to meet the shortfall. This condition, the plaintiff contended, was not a term of the letter of offer. He, however, remitted a sum of Kshs. 50,000/- which the Bank

accepted vide its letter dated 22nd January 2003 a copy of which was also produced as exhibit. By a letter dated 12th February 2003 he sought confirmation from the Bank that the outstanding amount was Kshs. 130,000/- which he was willing to raise. Vide the Bank's letter dated 18th February 2003, produced as exhibit, the Bank confirmed having received the sum of Kshs. 70,000/- but reiterated its position that it would only discharge the property on receipt of Kshs. 200,000/- together with a suitable security from the principal debtor. He thereafter took the principal debtor to the bank and followed it up by a letter dated 5th June 2003 requesting for confirmation that no adverse steps would be taken against the charged property, a letter whose copy was produced as exhibit. The principal debtor also, vide its letter dated 9th July 2003, confirmed the said meeting and offered an alternative security. A copy of this letter was also produced in evidence.

However, there was no response to this letter and the plaintiff subsequently learnt that the Bank was disposing of the suit property through Garam Investments. He, however, was not served with a statutory notice yet he had provided the Bank with particulars of his postal address. Neither was he served with any notice from the said auctioneers. He produced a copy of the letter to the Auctioneers from the Bank as exhibit according to which the outstanding sum was Kshs. 1,018,670.20 as at April 2003.

According to him the outstanding sum was Kshs. 130,000/-. While he never saw any newspaper advertisement in respect of the said property he produced a copy of the certificate of sale dated 22nd January 2004 indicating that the suit property was purchased by one **David Wainaina Kihoro** bidding on behalf of **Stephen Jeanson Kamau Kihoro** in the sum of Kshs. 450,000/-. A copy of the said certificate was produced as exhibit. He was not aware of any auction having taken place on the alleged date and his attempts to obtain the details of the said auction sale from the Bank were unfruitful and therefore he was unaware whether any valuation of the property was done before the sale. On learning of the said sale he raised the issue with the Registrar of Titles as well as the Chief Lands Registrar and produced a copy of the letter dated 14th April 2004 as exhibit. The District Land Registrar, Nyandarua by his letter to the Chief Lands Registrar confirmed that a transfer by Chargee was presented for registration but was rejected although he was unable to state the reasons for the rejection. A copy of that letter was similarly produced as exhibit. By his letter dated 4th June 2004 he made a follow up to the said Land Registrar and a copy of the letter was produced as exhibit. He also produced a copy of the letter dated 6th July 2006 from the District Officer, Kipipiri Division confirming that a consent in respect of the suit parcel of land was rejected due to the existence of a court order and no further consent had been issued. Through his advocates he wrote demand letters dated 8th September 2005 and 14th October 2005 complaining about the said transfer. According to the plaintiff he came to learn that the principal debtor had repaid the loan after the sale of the property and produced a copy of the letter dated 10th November 2004 by the bank to private investigators to carry out an investigation on the viability of the repayment of the loan.

The purchaser was eventually issued with a title on 24th January 2005, by which time there were no valid documents and he produced a certificate of official search as exhibit. According to a valuation report carried out at his request in 2010 the property had the value of Kshs. 4,100,000.00 a report a copy of which was produced. According to the plaintiff the Bank has never accounted to him for the proceeds of the sale and to him the said sale is a fraud as the purchaser has never resided in the suit land after realising the mistake. He therefore sought the orders in his amended plaint since neither the Bank nor the purchaser has sought for vacant possession of the suit land.

In cross-examination, he confirmed having executed the guarantee and was aware that in the event of default the same would be sold. On realising that the principal debtor was not making regular payments he made a proposal to the Bank. He admitted that the Bank threatened to sell his property and that he took the principal debtor to the Bank who offered security but the failure by the Bank to take the security was due to the Bank's ineptitude. He stated that at the time of the charge the property had been valued at Kshs. 485,000/- in 1994. He reiterated his unawareness on whether a valuation was conducted before the sale. He was unaware of any notice issued to him by the Bank. Although he admitted that an earlier order restraining the Bank from selling the suit property was set aside, he did not agree that the Bank was allowed to sale the property.

In re-examination, he clarified that at the time the order dismissing his application for injunction was issued, the sale he was challenging had already taken place.

The defence called one witness, **Morris Muthama Kinguri** who stated that he was employed by the 1st defendant as debt collection officer at the Head office and that he was tasked with the duty of following up bad debts. According to the witness G K & Associates approached the Bank for a loan of Kshs. 200,000.00 but as he had no facility he approached the plaintiff who accepted to give his parcel of land as security. Since the principal borrower failed to repay the loan the Bank had no option but to call upon the guarantor to pay which it did. A proposal was received from the plaintiff which proposals though accepted were not complied with forcing the bank to issue a notice dated 11th July 2003 after which it carried out a valuation of the property and instructed Auctioneers to sell the property. According to him the property was valued at Kshs. 400,000/-. He produced copies of the notice, court order and valuation report as exhibits. According to the letter of instructions the outstanding amount was Kshs. 1,018,670,20. The property was duly sold to the highest bidder one **David Wainaina Kihoro** on behalf of **Stephen Gershom Kamau Kihoro** at the sum of Kshs. 450,000.00 and he produced a memorandum of sale as exhibit. The Bank then proceeded to transfer the property to the highest bidder. In the opinion of the witness, the Bank followed due process. However, the Bank did not recover the full amount.

In cross examination, he said that there were correspondences to the principal debtor and copied the same to the plaintiff. He confirmed that the plaintiff's proposal was received but the condition given was not satisfied although the Bank received Kshs. 70,000/-. The alternative security offered was rejected on the ground that it was not saleable and the plaintiff was accordingly informed. According to the witness the property must have been advertised. According to him the notice must have been posted by registered post although he had no certificate of posting. Redemption Notice must have been sent according to him. The property was sold on 22nd January 2004 although he could not tell where and at what time the sale was conducted. He further said that the auctioneer must have given handbills and there must have been several bidders. The payment of Kshs. 450,000/- was effected by cheque whose copy he did not have. According to him the sum indicated as due was Kshs. 1,018,670.00 though the limit of the guarantee was Kshs. 200,000/- out of which Kshs. 70,000/- had been paid. He, however, stated that the Bank was entitled to charge interests. He, however, did not know who resides in the suit premises and the purchaser did not tell the Bank whether or not he had take possession. He did not know who did the registration and was not aware that the consent of the Board had been denied. He confirmed that the valuation of the property in 1994 was Kshs. 485,000/- while the valuation in 2004 was Kshs. 400,000/-. He stated that he was not aware where the plaintiff was residing.

In re-examination he stated that according to the memorandum of sale, the sale took place in Nyahururu Town and according to exhibit 6 the property was advertised.

At the end of the close of the case the parties filed written submissions. According to the plaintiff, his obligation came to an end when he fulfilled the condition of providing alternative security, despite having not paid the whole sum of Kshs. 200,000/-. It is further submitted that since the 1st defendant's investigations ascertained the principal borrower/s interest in land but failed to recover the outstanding sum therefrom, the 1st defendant's right to sell the plaintiff's property did not accrue. According to the plaintiff the Bank was enjoined to recover the debt from the principal debtor and only if diligent efforts to recover failed would the guarantor be involved and be given a chance to pay which did not happen in this case. Relying on the case of **Gitau Muiruri vs. Standard Chartered (K) Ltd HCCC No. 424 of 2004** and **Kenya Farmers Association vs. National Bank of Kenya Nakuru HCCC No. 106 of 2004**, it is submitted that the issuance and service of a Statutory Notice is mandatory before a chargee can realise the security as provided under section 74(2) of the Registered Land Act Cap. 300. It is further submitted that there was no evidence to controvert the plaintiff's contention that the notices were not served and reliance is placed on the case of **Martha Khayaga Simiyu vs. Housing Finance Co. of Kenya and 2 Others HCCC No. 937 of 2001** for the submission that the auction sale by the 1st Defendant is null and void. The plaintiff submitted that it is inconceivable that the property whose forced value in 1994 was Kshs. 485,000/- depreciated in value to Kshs. 400,000/- in 2003. It is also submitted that the failure to prove the date, time and place of the auction renders the sale null and void. Since there is no evidence of advertisement, the sale must have been carried out illegally moreso since there was no evidence of the bids made. Again there was no evidence that redemption notices were issued.

Since the defendants did not serve the mandatory notices the 1st defendant could not lawfully pass title in the suit property and any transfer is illegal and void and the only remedy available is to cancel the second title and restore the original title. According to the plaintiff, the circumstances under which the sale was conducted points to fraudulent transfer. Accordingly, it is submitted that the plaintiff is entitled to the orders sought in the plaint. In the alternative the plaintiff prays for special damages in the sum of Kshs. 4,100,000/-. The plaintiff also prays for costs of the suit.

On behalf of the defendants, only the 1st defendant filed written submissions. It is submitted that a notice was duly issued on default in repayment of the sum advanced. The said notice, it is submitted was sent by registered post and reliance is placed on the case of **Trust Bank vs. Eros Chemists Limited & Another Civil Appeal No. 133 of 1999**. Accordingly, as the plaintiff did not repay as demanded in the notice, the Bank was entitled to proceed with the sale. It is further submitted the plaintiff would only be entitled to damages if the sale was done at an undervalue. Since the plaintiff undertook a legally binding obligation to pay the debts plus interests at the rate of 30% as stated in the guarantee dated 12th February 1994, he is legally bound to pay off all the debts incurred by the principal debtor in respect of the overdraft facility. Accordingly, the defendant submits that the suit be dismissed with costs.

At the close of the pleadings the parties filed agreed issues as follows:

1) Was the Principal loan of Kshs 200,000/= repaid either by the principal debtor or the plaintiff?

2) Did the 1st Defendant attempt to recover its loan from the principal borrower?

3) Did the plaintiff make a proposal to repay the loan and did he commence the payments. If so, how much was paid?

4) Under the circumstances did the Bank's statutory right of sale accrue?

5) Did the bank comply with statutory requirements in realization of the security specifically:-

   (a) Issuance of service upon the plaintiff of a valid statutory Notice?

   (b) Issuance and service upon the plaintiff of a valid notification of sale.

   (c) Issuance of appropriate press advertisements to the public?

6) Did the Auction sale comply with the Auctioneers Rules and the relevant statutory provisions more so with regard to: -

   (a) Prior valuation of the property.

   (b) Advertisement

   (c) Place of Auction

   (d) Time of auction

   (e) Calling out bids

   (f) Affording the plaintiff right of redemption

7) Was the suit property lawfully and regularly transferred to the 2nd Defendant?

8) Did the 1st defendant unlawfully and illegally dispose off the suit property under the circumstances?

9) Was the sale of the suit property fraudulently conducted under the circumstances?

10) was the suit property sold at a gross undervalue bearing in mind

(a) The value prior to the taking of the loan.

(b) The value prior to the auction sale.

(c) The current market value

11) What is the effect of the illegalities and fraud, if any on the sale?

12) What is the plaintiff's remedy?

13) Who bears the costs of this suit?

Although not specifically made an issue in these proceedings, the issue of res judicata was raised in the pleadings. In the court's view, since Section 7 of the Civil Procedure Act bars the Court from dealing with a matter in which the doctrine applies, that issue is a jurisdictional issue which the court cannot ignore. In any case, the court is not bound by the issues as framed by the parties. To quote Oder, JSC in the case of **GOKALDAS TANNA VS. ROSEMARY MUYINZA & DAPCB SCCA NO. 12 OF 1992 (SCU)** expressed himself as follows:

> **"An agreement on the terms that upon finding the issue in the positive judgement should be entered in favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgement in favour of one or other of the parties whether or not such a judgement was contrary to any legal provisions".**

Accordingly, I hold that parties cannot and should not in drawing the issues or by consenting to the mode of proceeding seek to tie in advance the hands of the trial Judge in his judgement since this amounts to attempting to oust the function of the Court to arbitrate fairly the dispute between the parties and to come out with decisions that appear just in its opinion.

To that issue, I now proceed. I have perused the proceedings in HCCC No. 2004 of 2000 and it is correct that on 3rd June 2003, the said suit which was filed by the plaintiff against the 1st defendant herein was dismissed with costs for want of prosecution. The question is whether a suit dismissed for want of prosecution is a suit dismissed on merits for the purposes of res judicata. In The Tee Gee Electrics & Plastics Co. Ltd. vs. Kenya Industrial Estates Ltd. Civil Appeal No 333 Of 2001 [2005] 2 KLR the Court of Appeal held that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits. In the case of Jairo Angote Okonda vs. Kenya Commercial Bank Ltd. Civil Appeal No. 216 of 1999 the same Court held that dismissal of a case for want of prosecution is no bar to filing a fresh suit as long as the latter is filed within the limitation period.

In the foregoing circumstances, I hold that the dismissal of HCCC No. 2004 of 2000 does not render this suit res judicata.

With respect to the issue no. 1, as per the agreed issues signed by the parties herein, it is clear from the plaintiff's own evidence that out of Kshs. 200,000/- that he guaranteed he only paid Kshs 70,000/- leaving Kshs. 130,000/- outstanding. Apart from that sum there was no evidence of how much if at all was paid by the principal debtor. The principal debtor himself who would have shed some light on how much, if any, he paid was not called to give evidence. The court is therefore not satisfied that apart from Kshs. 70,000/- the outstanding amount was settled. Whereas it is true that his guarantee was limited to Kshs. 200,000/- the charge was not likewise limited and therefore the Bank would have been perfectly entitled to realise the same towards the recovery of the charged sum, all things equal.

On the 2nd issue, we have no evidence from the defendant of the attempts, if any, that were made to recover the loan from the principal borrower.

With respect to that 3rd issue it is admitted that a proposal was made for payment of Kshs. 200,000/- out of which Kshs. 70,000/- was paid.

On the 4th issue, whether the Bank's statutory right of sale accrue, the issue cannot be decided until the determination of the other issues. However, it must be made clear that the mere fact that the Bank did not attempt recovery from the principle debtor did not disentitle it from realising its other securities. In **Bala Holdings Ltd. vs. Delphis Bank Ltd. & Another Nairobi HCCC No. 812 of 1998** Ole Keiwua, J (as he then was) stated that where the guarantee does not provide that recourse should first be made to the primary debtors before the surety can be called upon to pay, the issue that remedies against the borrowers should have been exhausted is not acceptable. Again in **Kenindia Assurance Company Limited vs. Commercial Bank of Africa Limited & Others Civil Appeal No. 11 of 2000** the Court of Appeal held that there were three distinct transactions and the transaction relating to Shs. 20 million was a separate one comprising two financial guarantees by the appellant and this fixed the appellant's liability at Shs. 20 million, and really had nothing to do with the arrangements between the borrowing company and the lending bank.

As for issue no. 5, the plaintiff's case is that he was never served with any notice before the property was sold. The defendant's case, on the other hand is that a statutory notice dated 11th July 2003 was duly issued and was sent by registered post. In **Trust Bank Ltd. vs. Eros Chemists Ltd. & Another Civil Appeal No. 133 of 1999 [2000] 2 EA 550** the Court of Appeal held inter alia:

> **"The starting point of any discussion...is to consider what the object of a notice is. The notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished and this would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. A notice seeking to sell the charged property must expressly state that the sale shall take place after the three months period. To omit to say so or to state a period of less than three months for sale (as was in Russell's Case) is to deny the mortgagor a right conferred upon him by statute and that must clearly render the notice invalid...There is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. The provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, in failing to have the notice to say so, the Bank failed to give a valid notice. The earlier decision in Russell's Case is erroneous and the court is not bound to perpetuate an error. It is a recent one and has not acquired the respect and following attributable to age. Moreover, it is unlikely that property rights have been acquired on the basis of the earlier decision and indeed it is the duty of the court to rectify an erroneous decision. Therefore the court should declare, as it hereby does, that the decision of the court in Russell's Case is wrong and the notice in the instant case did not entitle the mortgagee to exercise a power of sale".**

In the above case, the Court of Appeal was dealing with the defects in a notice that was actually sent. In the present case, it is being alleged that no notice was sent at all. Although the defendants produced notice which was purportedly sent by way of registered post, there was no evidence at all that the said notice ever left the Bank premises. In Samuel Kiarie Muigai vs. Housing Finance Company of Kenya Limited & Another Nairobi (Milimani) No. 1678 Of 2001 [2002] 2 KLR 332 Ringera, J (as he then was) stated inter alia that:

"The notice required under section 74 of the Registered Lands Act must be one which requires the chargor to pay the money within three months of the date of service thereof and not within three months of the date thereof otherwise it is invalid if the notice is not hand delivered but posted... If it is manifest that the notice was posted to the address which the chargor had advised the chargee in writing was no longer his, that is a prima facie case... The omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages as it is a fundamental breach of the statute which derogates from the chargor's equity of redemption and without service of a valid statutory notice, the power of sale and the actual auction are merely acts pursuant to a pretended power of sale. As such they are a nullity in law".

Accordingly, there is no evidence upon which the court can find that the necessary notices were sent. Since a person cannot be expected to adduce positive evidence to prove a negative, the plaintiff's only way of showing that he was not served is by denying such service after which the burden of proving service shifted to the 1st defendant. In **Maria Ciabaitaru M'mairanyi & Others vs. Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA** the Court of Appeal held that whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence. Since it is the 1st defendant who wishes the court to believe that the notice was duly served, it was upon it to adduce sufficient evidence to prove so. It is not enough for the defendant to simply state that it believes the notices were sent and advertisement done. Accordingly, issue no. 5 is answered in the negative.

With respect to issue no. 6, the defendant produced as exhibit 3 a valuation report by Centenary Valuers & Property Consultants indicating that the suit property was valued on 4th November 2003. Since the said report was admitted without any objection and in the absence of evidence to the contrary, I do find that before the sale of the suit property on 22nd January 2004 the property was valued and a report duly prepared. As for the issue of advertisement, calling for bids and affording the plaintiff right to redemption, there is no evidence to support the same. Accordingly, the rest of the sub-issues are answered in the negative.

With respect to issue no. 7, it is the plaintiff's contention that the transfer was illegal since it was done without the sanction of the relevant Land Control Board. The plaintiff produced copies of the correspondences in which the relevant authorities denied any knowledge of such transfer. Yet the defendants did not attempt to produce evidence to the contrary. The transfer was effected by the defendant and it was the defendant who ordinarily should have been in possession of the transfer documents. If for any reason it did not have them the same would have been retrieved from the relevant lands offices. As this was not done the court is left with no option but to draw adverse inference that had the said records been availed, they would have shown contrary evidence to the case that was being fronted by the defendants. Although the registration of a person as the proprietor of a parcel of land is prima facie evidence that the person whose title appears therein is the duly registered owner, where that ownership is challenged and the officers who would ordinarily possess the documents authenticating such registration have disowned any knowledge of registration, that presumption cannot on its own be validated. That takes care of issue no. 8 as well.

With respect to issue no. 9 it is important to determine what amounts to fraud. In **Yosia Ofumbi vs. Nagongera Farmers & Another Kampala HCCS No. 449 of 1992** fraud was defined as the knowledge of other people's rights, and the deliberate acquisition of a registered title in face of such knowledge actual or constructive, which would render voidable the certificate of tile, so obtained, and voluntary ignorance is for this purpose the same as knowledge.

In Katende vs. Haridas and Company Limited Civil Appeal No. 84 of 2003 it was held that:

> **"For a party to plead fraud in registration of land a party must first prove that fraud was attributable to the transferee. It must be attributable either directly or by necessary implication, that is, the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act...This was not a case of a mere irregularities but a case of a person who had no title to pass to a purchaser. The appellant claims a title tainted with fraud**

from the beginning up to the time of sale of the suit property. The irregularities in the substitute certificate rendered it null and void. Similarly, any document based on it was of no effect for the same reasons. Firstly, the instrument purportedly transferring the title was written in respect of another piece of land. There was no way title could have been passed. The issue was not of irregularities in the registry only but the predecessor had no title to pass which eventually was transferred to the appellant. There is no doubt that the appellant benefited from and took advantage of the fraudulent transactions...Fraud is a very serious allegation. It means actual fraud, which means dishonesty of some sort but not constructive fraud. Fraud must be pleaded specifically and proved. The standard of proof required is higher than the usual balance of probabilities in civil matters. However, the standard of proof is not so high to require proof beyond reasonable doubt...Fraud can be participatory which means the party participates in fraudulent dealings. However, fraud can be imputed on a person, that is when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. In short all those who actually participate in the fraudulent transaction and who had knowledge of it are privy and have notice of fraud...However, the doctrine of bona fide purchaser for value without notice is a complete defence to allegations of fraud. Although our law does not define it, the doctrine was incorporated in section 176(c) of the Registration of Titles Act to protect innocent buyers. The courts are generally guided by Common Law principles and hitherto the many decided cases on this doctrine. For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that: 1) he holds a certificate of title; (2) he purchased the property in good faith; (3) he had no knowledge of the fraud; (4) he purchased for valuable consideration; (5) the vendors had apparent valid title; (6) he purchased without notice of any fraud; and (7) he was not a party to the fraud...A bona fide purchaser of a legal estate for valuable consideration without notice has absolute, unqualified and answerable defence against the claims of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up. It is a single plea and is not sufficiently made out by proving purchase for value and leaving it to the opposite party to prove notice if he can. There is a requirement that in case where there are series of subsequent transfers for the title of the incumbent registered proprietor to be impeached, all previous frauds must be brought to the knowledge of the person concerned. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact the he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not itself prove fraud on his part. However, if it is shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him...Whether the appellant had notice or not, decisions taken by his agents, namely, lawyers or auctioneers on his instructions must be binding on him. On the record before the court it is hard to believe that any agent handling the transaction on the suit property would fail to note the glaring irregularities before advising their client to buy the suit property. In the present case, the appellant told the court that almost everything was done for him and that his lawyers carried out a search in the Land Registry and found the suit property free of encumbrances. In the court's view the search was not done with diligence as a proper search would have brought out all the fraudulent dealings on the suit title. As the appellant's advocates, they should have discovered that the relevant documents were not signed by the Registrar which rendered them null and void. Lands are not vegetables that are bought from unknown sellers but are valuable properties and buyers are expected to make thorough investigations not only of the land but also of the seller before purchase. A purchaser who, without investigating whether his predecessor had any title or power of Attorney to sell the land could not be held as a bona fide purchaser...Clearly, in the present case circumstances warranted investigating the predecessor's title which on the evidence from the registry was defective. No letters of administration were produced. Further there was also evidence that before the purchase of the suit property, there were the alleged illegal occupants occupying the suit property and yet they were civil servants under a Government Scheme. Clearly, their presence on the premises was suspect and therefore a warning of a possible dispute. For the aforesaid omissions the appellants cannot be said to be bona fide purchasers for value without notice...A large part of the appellant's testimony consist of hearsay evidence as none of his agents or officials in the Registry...was called to give evidence. The logical conclusion is that none of the agents carried out the necessary investigations. Secondly, if investigations were properly done then the failure by the appellant to call his agents to give evidence was suspect. Clearly, it is only their evidence that would have assisted the appellant to establish the plea of *bona fide* purchaser for value. As the evidence stands, it is not certain as to whether there was a valid sale agreement signed. The failure to call the aforesaid agents drew an inference that their evidence, if called would have been or would have tended to be adverse to the appellant's case...The aforesaid notwithstanding if the search had been properly carried out still the onus of proving the plea of *bona fide* purchaser was squarely at the door of the appellant. It was incumbent on the appellant to call witnesses to rebut the allegations. This, however, must not be seen as shifting the burden of proof. The appellant had to defend himself by rebutting the allegations of fraud and to establish his plea of *bona fide* purchaser. The appellant's defence of ignorance, non-participation and illiteracy did not in any way challenge the cogent evidence of the respondent's witnesses. He did not only largely rely on hearsay evidence but the respondent's evidence was not challenged at all apart from the aforesaid testimony of the appellant...Whereas under section 59 of the Registration of Titles Act a certificate of title is conclusive evidence of ownership of the property, there are exceptions such as fraud. Assuming that the appellant had obtained a valid certificate to the suit property it would have been liable to impeachment for fraud...The appellant's case is not one of only irregularities in the early stages but is a case tainted with fraud and forgeries throughout...There were also other serious omissions and irregularities which reflected fraudulent transactions. A good example is the different figures shown as consideration or purchase price in different documents. Further, at first the appellant denied having signed the sale agreement but later admitted having done so. Again on instructions of UCB he paid the money to different persons but could not explain further, which was strange. The only inference to be drawn from it, is that the purchase price if paid at all was shared by those who participated in the fraudulent transactions...Clearly, in the instant case there was also evidence to show that the perpetrators got assistance from some officials from the Land Registry...to interfere with the records with the intention of depriving the respondent of its title to the suit property. The plea of *bona fide* purchaser for value could not be available to him because of the imputed fraud of his agents...On the evidence and the conduct of the appellant he could not have been a bona fide purchaser for value. Whether an imperfect title would pass a good title would depend on the imperfection, whether fatal or found to go to the root of the transaction or minor. There is, therefore, a duty on the buyer personally or through his agents to inquire into the title of his predecessor".

In the instant case no official from the Lands Registry was called to adduce evidence on how the suit parcel was eventually transferred in light of the correspondences emanating from the officers from the lands registry and the relevant Land Control Board. The purchaser himself has not appeared to give evidence in these proceedings as to how he acquired the suit parcel. Neither has the person who purportedly bid on his behalf given evidence. Since the alleged purchase, according to the plaintiff, which evidence has not been controverted, he has never been

seen anywhere near the suit premises. Therefore, the cumulative effect of the evidence goes to prove that on a balance of probabilities there were fraudulent activities perpetrated in the disposal of the suit premises. In the premises issue no. 9 is positively answered.

With respect to whether the suit property was sold at an undervalue, it is not in dispute that in the year 1994, the suit property was valued at Kshs. 485,000/-. Ordinarily one would have expected that by the time of the sale of the suit property in the year 2003 the value would appreciate. It is therefore surprising that in the year 2003 the same property was being valued at Kshs. 400,000/- unless the original valuation was not genuine. I am fully aware that a mortgagee though not a trustee for the mortgagor as regards the exercise of the power of sale, must nonetheless exercise the power in a prudent way, with due regard to the interests of the mortgagor on the surplus sale moneys. He has his own interest to consider as well as the mortgagor, and provided he keeps within the terms of the power, exercises the power bona fide for the purposes of realising the security and takes reasonable precautions to secure a proper price the Court will not interfere, nor will it inquire whether he was actuated by any further motive. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him provided the amount is fixed with regard to the value of the property. See **Eccon Construction and Engineering Ltd vs. Giro Commercial Bank Ltd And Another [2003] 2 EA 426.**

Whereas, the defendant's valuation is not of much help without explaining the depreciation in the value of the property, the plaintiff's evidence was not of much help either because the valuation report produced by the plaintiff in this case was in respect of valuation done on 27th March 2010. It would have been more helpful if the valuation was conducted at the time of the sale or soon thereafter. Accordingly, I am unable to find one way or the other on the issue.

What then is the effect of the failure to serve statutory notices and fraudulent and unlawful transfers? The law is clear that where a property is purportedly sold by a chargee without serving a valid statutory notice, the sale is not an irregularity but is null and void. In this case, it is worse since there is no evidence that a statutory notice, valid or otherwise, was ever served. If the sale is void then, in my view there is no valid title that can be passed to the purchaser. In certain cases a *bona fide* purchaser for value without notice may acquire title. However, in this case, there was no evidence that the said purchaser was a *bona fide* purchaser. I accordingly find that the purported sale of the suit property by the 1st defendant to the 2nd defendant was null and void and the 2nd defendant acquired no title therefrom.

What are the consequences of an act that is declared to be a nullity? In Association of Member Episcopal Conference In East Africa (Amecea) vs. Alfred Roman T/A Romani Architects & Others Civil Appeal (Application) No. 22 Of 2001 the Court of Appeal held if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there as it will collapse. It follows that if the sale was a nullity the subsequent transfer and registration of the suit parcel in the name of the 2nd defendant was similarly a nullity. It cannot stand. It must collapse.

What then is the remedy available to the plaintiff? To effectuate the collapse of the proceedings subsequent to the purported sale, I am of the view that to order the defendants to pay damages would amount to court rubberstamping and validating an illegality. The Court must send a strong message to the chargees that in order for them to deprive the chargor of his interest in the property in the exercise of their statutory power of sale, the law must be strictly adhered to. If not the Court will not hesitate to annul any actions taken pursuant to illegal actions.

Accordingly, I declare that the auction sale of LR No. Nyandarua/Ndemi/1474 is illegal, null and void.

The plaintiff also has sought an order compelling the Land Registrar (Nyandarua) to rectify the record reversing ownership of LR No. Nyandarua/Ndemi/1474, to the Plaintiff, Zakayo Ndung'u Ngugi. However, the said Registrar is not a party to these proceedings. It is trite law that Courts do not make orders directed against non-parties. It is also my view that where a party seeks to have title to land rectified the relevant land registrar should be joined as a party. In the premises I direct the defendants jointly and/or severally to execute the necessary documents to effectuate the transfer of land parcel no. Nyandarua/Ndemi/1474 from the 2nd defendant to the plaintiff within 21 days. In default of such transfer, the Deputy Registrar of this Court is directed to execute the same pursuant to section 98 of the Civil Procedure Act.

In the premises the 2nd defendant is also restrained from transferring LR. No. Nyandarua/Ndemi/1474 to any other person.

Although the plaintiff also sought damages, there was no evidence that he has suffered any such damages. By his own evidence he is still in occupation of the suit land and no attempts have been made to evict him. With respect to damages for mental anguish that head of damages is unknown to this jurisdiction in these types of claims. See **CPC Industrial House Products (K) Ltd. vs. Omweri Angima Civil Appeal No. 197 of 1992.**

Whereas, I have found that this suit is not res judicata, I am however of the view that a litigant who files a suit and neither prosecutes the same nor withdraws it and waits until the same is dismissed for want of prosecution is guilty of abuse of the process of the court and is undeserving of the exercise of the Courts discretion. In the circumstances there will be no order as to costs.

Judgment read, signed and delivered in court this 15th day of March 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Mutuli for Njengo for Plaintiff

Mr. Munyororo for Defendant